United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-7386

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-7386, 76-7393, 76-7417 and 76-7446

VANA TRADING CO., INC.,
Plaintiff-Cross-Appellant-Appellee,

—against—

S.S. "METTE SKOU", her engines, boilers, etc., and FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Defendant-Third-Party Plaintiff-Appellant-Appellee,

—against—

OVE SKOU and INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendants-Cross-Appellants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD-PARTY DEFENDANT-CROSS-APPELLANT-APPELLEE INTERNATIONAL TERMINAL OPERATING CO. INC.

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Statement of Facts

This action was instituted by plaintiff, Vana Trading Co. Inc. ("Vana") against defendant, Flota Mercante Grancolombiana, S.A. ("Flota") for alleged damage to a

cargo of Colombian yams transported from Cartagena, Colombia to New York aboard the S.S. "Mette Skou" in June and July of 1974. At that time, the vessel was operating pursuant to a New York Produce Exchange time charter party, dated April 26, 1974 (451a)* between Ove Skou, ("Skou") as Owners, and Flota, as Charterers. In the present suit, Flota has impleaded both Skou, the shipowner, and International Terminal Operating Co., Inc. ("ITO"), the stevedores providing discharge services in New York, as third-party defendants.

The facts surrounding this claim are as follows. The "Mette Skou", after making several previous calls to load cargo, stopped at Cartagena, Colombia and loaded a cargo of 5,000 cartons of yams consigned to the plaintiff in New York. Although Flota and Skou disagree as to the identity of parties authorizing stowage, it is not disputed that the yams were stowed in the deep tanks of the vessel. Flota issued a bill of lading covering that shipment at Cartagena on June 19, 1974, and the vessel set sail soon afterward, arriving in New York on July 1, 1974. (33a, 34a).

Flota had retained ITO to discharge the cargo from the vessel and to store that cargo at the Brooklyn Army Base Terminal until it could be picked up by the consignee. (339a). At the time ITO began discharge of the vessel on July 1, Mr. Larsen, Chief Mate of the "Mette Skou", conferred with Mr. Sebazco, of Flota, and Mr. Flynn, pier supervisor for ITO, and requested that the subject yams be discharged from the deep tanks first. Mr. Sebazco, the representative of Flota, denied that request, and instructed that coffee stowed in the number three hatch be discharged before the yams. (535a). Mr. Larsen later confirmed this refusal on the part of Flota in a letter report to his employers, Skou. (460a).

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* Unless otherwise noted, all numbers in parentheses refer to page numbers in the Joint Appendix.

ITO commenced discharging the vessel on the morning of July 1, 1974, and completed discharge on July 3, at 7 p.m. (328a, 329a). According to Mr. Flynn, ITO's pier supervisor, he had been instructed to have the vessel discharged before the July 4 holiday. (329a). As Mr. McGann of Flota testified on cross-examination, it would normally take three days to discharge a vessel of comparable size carrying a comparable amount of cargo. (239a). Here, ITO completed discharge of the "Mette Skou" within three days of its arrival in New York.

Mr. Sousa, the president of Vana, was present at the ITO pier in Brooklyn when the yams were being loaded off the vessel. Although several cartons allegedly fell out of the discharge net onto the pier coming off of the ship, Mr. Sousa made no complaint to ITO concerning the method of discharge, and evidently thought that any handling damage incurred was so negligible that it did not warrant his attention. (178a). As the yams were taken off the ship, he observed that cartons of yams were being palletized and stowed at several different locations on the pier. (58a). The plaintiff, Vana, does not itself possess or lease any warehouse facilities for the storage of cargoes awaiting delivery to consignees. (125a). According to Mr. Sousa, plaintiff Vana liked to keep yams on the pier since ". . . it is right on the sea, you have excellent ventilation." (149a).

A representative of the U.S.D.A. sampled the yams during discharge on July 2, and noted pulp temperatures ranging from 80° to 100°+. (353a). Mr. Sousa took his own temperature readings on July 2, and registered readings of up to 120°. (173a). He found in addition that there was an "unusual smell of decay" at that time. (53a). In light of these facts, which were apparent at the time the yams were discharged from the ship on July 2-3, Mr. Sousa concluded that:

> ". . . I knew *on the pier* that the majority, the vast majority, would have no market value."
> —(107a) (Emphasis added)

It should also be noted that Mr. Sousa was "too busy" to separate good yams from bad as they were coming off the ship. (53a, 152a).

Vana made arrangements with ITO concerning the loading of the cargo onto trucks for eventual delivery to buyers. The procedure followed in the Port of New York for the loading of trucks at piers is as follows. A loading team consisting of a checker, a hi-lo driver, and a laborer are usually provided by the terminal company, in this case, ITO. The checker ensures that the cargo goes to the correct truckman, and notes any unusual condition of the cargo on his tally. The hi-lo driver and the laborer assist the truck driver in the actual loading process.

The checker's tally sheet is then turned over to the delivery clerk, who notes any exceptions to cargo condition in the ocean carrier's delivery book. Truckmen indicate their assent to the accuracy of cargo exceptions by signing the delivery book before they leave the terminal area. (334a-337a). The only exceptions made upon Flota's delivery book here (458a) noted that 27 cartons were crushed, with "contents intact", and that 21 cartons were "recoopered", i.e., damaged but repaired. (264a). This small exception aside, no exceptions were taken to any alleged handling damage on the part of ITO.

ITO must order all of its laborers, such as those described above, through the local Waterfront Commission hiring hall. (327a). On July 3, ITO could not get sufficient labor to load cargo onto all the trucks ordered by Vana. Accordingly, Vana used its own personnel to assist. Out of four trailers loaded on July 3, Vana used its own labor in loading three. Mr. Sousa admitted at time that ITO made no objection whatsoever to his using his own labor. (157a, 158a). Nonetheless, Mr. Sousa cannot remember whether or not he attempted to use his own labor on following dates, although it was clear that he had the option to do so. (157a).

The delivery book indicates that Vana accepted delivery of 2,397 cartons on July 3, 684 cartons on July 8, 350 cartons on July 10, and 1,551 cartons on July 11. (247a, 248a). It is of particular importance that Vana accepted delivery of the 251 cartons which it was later able to sell for salvage on July 11. (156a). These cartons marked Vana's only successful effort at salvage here, amounting to a recovery of $3,000.00. (61a).

ITO was subsequently forced to institute suit against Vana in the Civil Court of New York for charges due in connection with loading and tallying of its trucks here. In its Answer to the Complaint (442a, 443a), Vana, with the personal knowledge of Mr. Sousa, counterclaimed against ITO for damages arising from any delay resulting from ITO's alleged failure to have sufficient labor on hand. (161a). Vana and ITO reached a settlement in that action, again with the approval of Mr. Sousa. (162a). As part of that settlement, Vana executed a release to ITO in full satisfaction of its Counterclaim. (448a). That release is surely dispositive of any similar claims being made here.

After hearing the evidence at trial, the District Court found that the yams had matured in December 1973 but had not been harvested until March 1974 (11a); that the ship was seaworthy to carry yams in normal condition, properly packed and wrapped (15a); that the yams were in a "susceptible condition" at the time of loading (16a, 17a); that they were packed in unsuitable wrapping which resulted in a "cooking" effect (17a); and that the charterer had contributed to any damage through stowage in the deep tanks. (17a).

Regarding the liability of ITO here, Judge Pollack stated:

> . . . In removing the cartons and storing them until delivery, ITO negligently destroyed further quantities of the commodity by its harsh handling in the removal

causing the collapse of cartons and damage to contents and by the subsequent unventilated storage of the commodity until delivery to the consignee. ITO thereby contributed to and aggrevated the fault assessable against Flota in a measurable amount but here again, one that can only be estimated."
—(18a)

We respectfully submit that such rulings are clearly erroneous in light of the above facts and the evidence submitted at trial, and we ask this Court to reverse the rulings of the District Court below which cast liability upon ITO in this matter.

POINT ONE

The lower court should have dismissed the third party complaint against ITO, since Vana had already resolved disputes with ITO regarding this matter in a previous action.

As noted above, Vana had retained ITO here to arrange for the loading of the yams from the "Mette Skou" onto trucks at the Brooklyn Army Terminal. ITO was subsequently forced to institute suit against Vana in the Civil Court of New York for failure to pay for services rendered by ITO in that connection. Vana counterclaimed against ITO in its Answer to the Complaint, alleging the following cause of action;

". . . 2. That on or about July 1, 1974, the plaintiff contracted and was hired to provide personnel and equipment to unload imported merchandise of defendant into trucks separately hired by defendant.

3. That plaintiff breached said contract and hiring in that it did not timely unload and load, or provide personnel and equipment to continuously perform the

> required work, thereby causing damage to the defendant in the sum of $2,000.00."
> —(443a)

This contention is identical to that which Flota makes against ITO in this present action, namely, that ". . . ITO's failure to provide adequate manpower to complete the unloading of the yams as quickly as possible, and to deliver them to Vana, all contributed heavily to the damage to the yams." (Flota's brief, p. 9). It is not disputed that, as a part of the settlement of that previous action between Vana and ITO, Vana executed a release to ITO in full satisfaction of the Counterclaim set forth above. (448a). It is hornbook law that this previous resolution is binding on any subsequent action, such as the one here, which involves the same parties, the same cause of action, and the same operative facts. This rule is not altered by the fact that the previous action here was resolved through settlement; the release is conclusive. See, e.g., *Ruskay* v. *Jensen,* 342 F.Supp. 264 (S.D.N.Y. 1972).

That release precludes Vana from recovery here on the subject matter of its Counterclaim—and that bar would apply to Flota as well on two counts. First, Flota premises its Third-Party Complaint upon the assumption that ITO's negligence was the proximate cause of plaintiff's loss:

> ". . . if the plaintiff sustained the damages set forth in the complaint in the manner and at the time and place stated, through any fault other than its own, same was caused by the sole, overt, active fault of the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO. INC."
> —*Id.*

In other words, Flota is merely enforcing over against ITO whatever purported rights the plaintiff Vana would have against ITO. In light of the previous settlement between

Vana and ITO, there remains no right of recovery here against ITO, either directly, through Vana, or indirectly, through Flota.

Both the Counterclaim and the release in the previous action were executed by Vana with the informed approval of Mr. Sousa, its president. (161a, 162a). Thus, Vana would also be precluded from recovering against Flota for any damages attributable to the breaches which were the subject of Vana's previous Counterclaim. It is axiomatic that one who obtains full recovery from one of several tortfeasors is not entitled to a double recovery on the same cause. *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed. 2d 77, reh. denied, 401 U.S. 1015, 91 S.Ct. 1247, 28 L.Ed. 2d 552 (1971); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967), cert. denied sub nom., *United States* v. *Ingham*, 389 U.S. 931, 88 S.Ct. 295, 19 L.Ed. 2d 292 (1967). Since Vana, therefore, could not recover from either ITO or Flota, the District Court should have dismissed the Third-Party Complaint, as there would have been no legally sufficient cause for Flota to urge any rights of indemnity against ITO.

POINT TWO

The lower court erred in granting indemnity over against ITO in favor of Flota in the amount of $1,000.00.

It is well settled law that it is only when a stevedore-terminal operator fails to fulfill his obligations and is negligent that he must respond to the shipper for any damage to cargo caused by such negligence. *Luigi Sierra, Inc.* v. *S.S. Francesco*, 1965 A.M.C. 2029 (S.D. N.Y.) aff'd 379 F.2d 540 (2nd Cir., 1967). The bill of lading is not a contract between the stevedore/terminal operator (ITO) and the shipper/consignee, *Leathers Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800 (2nd Cir., 1971). Therefore, the

stevedore/terminal operator is not bound by the terms and conditions of a bill of lading, since it is not a party thereto, *Stein Hall & Co., Inc.* v. *S.S. Concordia Viking*, 494 F.2d 287 (2nd Cir., 1974). With regard to this shipment of yams, International Terminal Operating Co., Inc., has committed no act of negligence and/or breach of warranty which would render it liable for the damages here.

The rights and liabilities as between the stevedore, and the ocean carrier, ITO and Flota, respectively, are not governed by the terms and provisions of the bill of lading, but rather are governed by the contract between the parties, *Stein Hall & Co.* v. *S.S. Concordia Viking*, supra; *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295 (2nd Cir., 1964). However, the stevedores' warranty of workmanlike service can also be limited or superseded by an express provision in the stevedoring contract, *Stein Hall & Co.* v. *S.S. Concordia Viking*, supra, *David Crystal, Inc.* v. *Cunard Steamship Co.*, supra.

As examination of the proofs here will show that any damage which occurred to the yams was not a result of ITO's negligence and that no fraud, intentional or otherwise, was committed by ITO with regard to the availability of labor or anticipated time of discharge. In relation to any alleged negligence here, the third-party plaintiff must establish that ITO's alleged negligence was the proximate cause of the loss. *Saugerties Bank* v. *Delaware & Hudson Co.*, 236 N.Y. 425 (1923). Since this is not the cause here, the third-party plaintiff's claim against ITO must necessarily fail.

Flota attempts to cast liability upon ITO here upon the following grounds: (1) that ITO delayed in discharging the yams from the vessel, (2) that ITO made the decision to discharge coffee before the yams, (3) that ITO's stowage of the yams on its pier was inadequate, (4) that ITO improperly handled the cargo during discharge, and (5) that ITO did not provide adequate labor to enable trucks to load promptly. An examination of the record below

shows clearly that Flota has failed to sustain its burden on any of those points.

First, Flota was well aware of the method in which ITO obtained stevedores, and of the limitations upon ITO's ability to guarantee the availability of labor on isolated occasions. Mr. Kristiansson, executive Vice-President of Grancolombiana, New York, Inc., agents for Flota, arranged with ITO for the discharge of the "Mette Skou", and gave the following testimony at trial:

> "Q. Now, do you know the practice in New York for the stevedores to obtain labor from the hiring hall?
>
> A. Yes, I am familiar with it.
>
> Q. And are you also familiar with the fact that it is not unusual to get less than the number of gangs that you order in the port of New York?
>
> A. Occasionally it might happen."
>
> —(229a)

Thus, at the time it reached an agreement with ITO, Flota was well aware that ITO could not and did not intend to guarantee the availability of labor on a particular day.

In addition, Flota never established that there was in fact any deviation from normal stevedoring standards in the time it took ITO to discharge the "Mette Skou" here. Quite the contrary, Mr. McGann, director of operations for Grancolombiana, testified at the trial below as follows:

> "Q. For the amount of cargo that was coming off this ship, would it be normally expected that it would be a three-day job?
>
> A. Yes."
>
> —(239a)

The facts are undisputed here that ITO commenced discharging the vessel on the morning of July 1, 1974, and completed discharge on July 3 at 7 p.m.—in other words, the job was completed within three days. (328a, 329a).

Second, the record clearly indicates that Flota, not ITO, made the decision to give the first priority of discharge to the coffee rather than the yams. At his deposition, Mr. Larsen, the Chief Mate of the "Mette Skou", gave the following testimony:

> "Q. And that [log] clearly says that you requested the stevedores to discharge the yams, is that correct?
>
> A. Yes.
>
> Q. That conversation took place about 7:30 in the morning?
>
> A. Right.
>
> Q. Who was present at that conversation, if you know, if you remember?
>
> A. It was Mr. Sebazco [of Grancolombiana] the stevedores supervisor, Jack Flynn [of ITO] and me.
>
> Q. *Who refused to unload the yams at that morning, Mr. Flynn or Mr. Sebazco?*
>
> A. That was Mr. Sebazco because they wanted the coffee out first."
>
> —(535a) (Emphasis added)

From the above, Flota's agents, and *not* ITO, gave the order to discharge the coffee first. Thus, Flota cannot claim indemnity from ITO, for any delay which, if it occurred at all, was due solely to instructions given by representatives of Flota itself.

Third, no concrete evidence was presented at the trial below that ITO's stowage of the yams on its pier contributed to the damages suffered. Regarding the temperature tolerance of yams, Mr. Sousa testified that:

> ". . . yams is a tropical fruit and tropical weather conditions or prevailing temperatures are normally in the nineties. In Colombia, that would be around 90-95 degree temperatures and yams would last in such temperatures for nine, ten, eleven months."
>
> —(103a, 104a)

Mr. Sousa confirmed the statement several times during his testimony at trial. (99a). The yams here were only in ITO's custody for eleven days during a New York July. Surely the tropical fruit described by Mr. Sousa above would have been able to tolerate those eleven days without damage if it was in good condition upon discharge. However, the testimony here indicates that the yams had been irreparably damaged before they ever came off the vessel. As Mr. Sousa, who was present throughout discharge, testified:

> ". . . I knew on the pier that the majority, the vast majority, would have no market value."
> —(107a)

In addition, there was testimony of an "unusual smell of decay" at time of discharge (53a) and also of pulp temperatures in the yams ranging from 80° to 120°. (173a, 353a).

Likewise, Mr. Sousa, who would reasonably have been expected to be concerned as to the proper stowage of his yams, fully approved of the pier area for stowage since ". . . it is right on the sea, you have excellent ventilation." (149a). He also testified that ITO did not stow the yams in one large block, but rather palletized the cartons, placing them at various locations around the pier (58a). Thus, there is no evidence to indicate that ITO's stowage of the yams in any way contributed to the damages here.

Fourth, there is no evidence on the record below as to any appreciable handling damage on the part of ITO. On the contrary, what evidence there is indicates that ITO did not aggravate the damages already inflicted upon the yams. It was established at trial that exceptions to the condition of cargo are made in the ocean carrier's (i.e. Flota's) delivery book, and that truckmen for the consignee indicate their assent to the accuracy of cargo exceptions by signing the delivery book before they leave the terminal area.

(334a-337a). The only exceptions made upon Flota's delivery book here (458a) noted that 27 cartons were crushed, with "contents intact", and that 21 cartons were "recoopered", i.e., damaged but repaired. (264a). This small exception aside no other exceptions were taken to the condition of the cargo. And even those few exceptions set forth above go to the condition of the cartons rather than the commodity—27 cartons had "contents intact" and the other 21 cartons had merely been repaired. Thus, the record shows no evidence of improper handling on ITO's part.

Lastly, there is no factual basis on the record for ruling that ITO's shortage of labor to assist in truck loading contributed to whatever damage had already been inflicted on the yams. As noted above, there was testimony that the yams had been "cooked" by the time they came off the vessel. (147a). Moreover, ITO made no objection to Vana using their own labor to load trucks, and Vana in fact did so on July 3. (157a, 158a). Nonetheless, Vana apparently made no effort to supply their own help on subsequent dates, although it is clear they had the option to do so. (157a).

It is hornbook law that, in order to hold ITO liable here, Flota must establish not only that ITO was negligent, but also that its negligence was the proximate cause of the loss. See e.g., *Saugerties Bank* v. *Delaware & Hudson Co.*, supra. There is absolutely no evidence as to the degree of additional damage, if any, attributable to ITO here. Mr. Sousa at trial indicated that he was "too busy" to separate good yams from bad on the pier. (53a). When questioned by the Court about his failure to document damages, Mr. Sousa gave the following reply:

> ". . . It was just prohibitive for us to go through 5,000 cartons to find a few good ones.
>
> The Court: Well, it may have been prohibitive, but if you are trying to collect for something that you didn't do, what are these defendants to do about it?

The Witness: I did try, sir.

The Court: Well, you did try, but a good college try is not the same as proving what the actual extent of damage was. You are telling me that you don't know what the extent of the damage was because you didn't find out."

—(152a)

Mr. Sousa predictably claimed that the delay on the pier contributed to his damages, but when pressed to give even a rough estimate of this purported increase in damages, he could not do so:

"Q. You say that if there had been a quick delivery of the cartons at July 2 you would have been able to fumigate them and salvage them?

A. I would have been able to salvage much more, yes, sir.

Q. When you say 'much more' how much more?

A. Well, sir, it is hard to make such a prediction. I do know from what I saw on the pier that I could salvage a substantial quantity of the cargo, yes, sir."

—(118a)

Such wishful thinking from the same man who had testified that the "vast majority" of the yams on the pier had no market value (107a), can hardly justify holding ITO liable here. It is axiomatic that where, as here, divided liability is at issue, the burden of proof of the division of damages is on the complaining party, in this case, Flota. See, e.g., *The Neil Maersk,* 91 F.2d 932 (2d Cir. 1937). As can be seen from the above, Flota failed to meet that burden here, and the District Court should consequently have dismissed the Third-Party Complaint against ITO.

POINT THREE

The lower court should have dismissed the plaintiff's complaint.

It can conservatively be said that serious doubts were raised at trial as to the actual good order and condition of the yams here at the time when they loaded aboard the "Mette Skou" in Cartagena. The lower Court found that the yams had matured in December of 1973 (11a) and were in a "susceptible" condition at the time they were loaded on the vessel. (17a). In cases, as here, where there is doubt as to the good condition of the cargo at time of loading, a shipper such as the plaintiff here has the burden of apportioning the amount of damage resulting from the negligence of other parties. As Judge Augustus Hand stated in *The Neil Maersk,* supra:

> ". . . If the fish meal had an excess of moisture and oil, or was, because of other defects, in a condition unfit for shipment and the damages were thereafter increased through stowage in ill-ventilated and hot portions of the ship, the libelants would have the burden of showing what was the condition of the meal when placed on board. *Without proof of such condition, there would be no basis for calculating any damages caused by the carrier.*"
> —*Id.* at 934-935 (Emphasis added)

Surely this rule applies with equal force to parties of subsequent involvement such as ITO, where an aggravation of damages is alleged. The heat damage suffered by the yams here, according to Mr. Sousa, does not immediately manifest itself on the surface of the vegetable. (51a). However, the proofs below indicate that the yams underwent only visual inspection in Colombia before loading. (352a, 415a). A bill of lading without exceptions such as the one here merely constitutes evidence of *apparent* good

order and condition. *Hecht, Lewis & Kahn Inc.* v. *S.S. President Buchanan*, 236 F.2d 627 (2d Cir. 1956); *E. T. Barwick Mills* v. *Hellenic Lines*, 331 F. Supp. 161 (S.D. Ga. 1971). The burden is on plaintiff, however, to prove *actual* good order and condition at loading. *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104 (1931). Plaintiff failed to meet this burden; it demonstrated visual inspection—but the defect alleged could only be detected by cutting the yam. (57a). This was not done.

Moreover, the Court below found that the yams were in a "susceptible" condition at time of loading (17a) and had been improperly packed by the plaintiff so as to impede ventilation. (17a). These findings indicate that the defenses of inherent vice and insufficiency of packing should have been available to all defendants here pursuant to 46 U.S.C. § 1304 (2) (m) and 46 U.S.C. § 1304 (2) (n) respectively, as well as contributory negligence.

Since there was no factual basis on the record below for apportioning fault among the various parties, the Court below should have dismissed the plaintiff's Complaint. Judge Pollack apparently ruled that ITO was liable to Flota here on the grounds that ITO:

> ". . . contributed to and aggravated the fault assessable against Flota in a measurable amount but here again, one that can only be estimated."
> —(18a)

We respectfully submit that this statement really indicates that plaintiff did not sustain its burden of apportioning fault, and the lower Court should have dismissed the Complaint. As the Court noted in *Thomas Roberts & Co.* v. *Calmar Steamship Corp.*, 59 F.Supp. 203 (E.D. Pa. 1945):

> ". . . the burden is on the libelant to prove actual good condition at the time of delivery to the carrier, for

> where the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."
> —*Id.* at 207.

It appears that the lower Court here assessed damages of $1,000.00 against ITO on the basis of nothing more than such a doubt. Therefore, we respectfully submit that the lower Court should have dismissed the Complaint for plaintiff's failure to meet its burden. *The Neil Maersk,* supra.

POINT FOUR

Flota is not entitled to indemnity from ITO in this matter.

It is well settled that if both the ocean carrier and the stevedore were concurrently negligent, the negligent ocean carrier's claim for indemnity against a negligent stevedore should be barred, *Amerocean Steamship Company* v. *Copp,* 245 F.2d 291 (9th Cir., 1957), *McFall* v. *Compagnie Maritime Belge,* 1952 A.M.C. 1860 (N.Y. Court of Appeals, 1952). Since there is absolutely no negligence here on the part of ITO the third party complaint against it is without merit. And even assuming arguendo that ITO was negligent here, the lower Court found that Flota was negligent as well.

In indemnity actions between a carrier and a stevedore the general rule regarding counsel fees is that their allowance or disallowance is within the discretion of the trial court, *Famous Rogers* v. *U.S. Lines,* 305 F.2d 602 (3rd Cir., 1962) and further as stated in *Calderone* v. *Naviera Vacuba S/A,* 328 F.2d 578 (2nd Cir., 1964) at p. 579:

> "A distinction should be made between the shipowner's attorneys' fees incurred in defending against the longshoreman's claim and those incurred by the shipowner

in prosecuting its own claim for indemnification against the stevedore. In the absence of agreement between the shipowner and the stevedore to the contrary, only the former are recoverable from the stevedore. See discussion in *Holley* v. *The Manfred Standsfield,* supra. (186 F.Supp. 805 [E.D. Va. 1960]).”

However, in relation to the case at bar, since Flota failed to pay or tender to the plaintiffs herein that which was owed, the ocean carrier should be denied any reimbursement for attorneys' fees, *Toyomenka, Inc.* v. *S.S. Tosahura Maru,* 1974 A.M.C. 1531 (S.D.N.Y. 1974). At page 1535 the Court stated:

> “But the claim over also includes a claim for attorneys fees and disbursements. In the absence of a specific statutory provision, such an award lies within the discretion of the Court. See *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939). Here the Y.S. Lines failed to promptly pay or tender to the plaintiffs that which was owed. Even the loss of one carton which was admitted at trial was denied. I see no reason, therefore, to award attorneys fees and disbursements and that part of the demand is denied.”

In light of the foregoing, then, we respectfully submit that Flota is not entitled to indemnity from ITO here, and that the lower Court should have rendered judgment in favor of ITO on the Third-Party Complaint.

Conclusion

The judgment of the lower Court should be reversed and the complaint dismissed or, in the alternative, should be modified to the extent of denying indemnity to Flota against ITO.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 10TH day of NOVEMBER 1976

Purrington & MacDonell
By .....
Attorneys for PLAINTIFF - CROSS-
APPELLANT - APPELLEE

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by Stanley Grunes
Nov. 10/76.